which the Moratorium Proclamation (Repeal) Ordinance came into force and such period expired on the 2nd October, 1952.

In this case the renewal of the Writ and the enlargement of time for renewal will have the effect of depriving the defendant of a statutory defence and applying the principles laid down in *Battersby v. Anglo-American Oil Co. Ltd.*[2] in such circumstances the discretion which the Court has to exercise "is one which can be exercised only in one way if an exercise in the other direction would deprive a party of a legal defence" (at p. 32).

For the above reasons I set aside the Order made on the 6th February, 1933 and the Writ of Summons in this Civil Suit 1951 No. 255 and all subsequent proceedings including the service thereof. Costs (other than costs already taxed and paid) to be taxed and paid by the plaintiff to the defendant.

Judgment for the defendant.

WOK BINTE HUSSEIN v. HARCHAND SINGH

[O. C. J. (Storr, J.) June 11, 1953]

[J. B. — Civil Suit No. 42 of 1951]

Bills of Sale Enactment ss. 3 and 4 — Documents which are not on face of them bills of sale — Court will go behind documents to construe exact nature of documents — Objects of Bills of Sale Acts.

This case raises an important point as to whether the Court can go behind certain documents which on the face of them are not bills of sale and discover from extrinsic evidence the true nature of the documents.

The plaintiff here had executed two documents, one purporting to assign her two movable houses to the defendant and the other giving the plaintiff the right to repurchase the two houses by instalments.

The plaintiff's case was that the documents together amounted to a Bill of Sale and that since they were not in the prescribed form and were not registered the transaction was wholly void. To this Counsel for the defendant submitted that the 1st document amounted to an absolute assignment and that the 2nd document was an agreement to re-purchase by instalment, and that the Court cannot go behind these documents which speak for themselves.

Held, following the judgment of Lord Esher, M.R., in **Madell v. Thomas & Co.**[1]: the main object of the Bill of Sale Enactment is to protect borrowers against lenders and if documents appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, this Court will go through the documents in order to arrive at the truth.

From the evidence adduced as to the circumstances of the transaction, the two documents amount to a Bill of Sale.

Cases referred to:—

(1) *Madell v. Thomas & Co.* (1891) 1 Q.B. 230.

(2) *In re Watson* (1890) 25 Q.B. 27.

(3) *Polsky v. S. & A. Services* (1951) 1 All E.R. 185.

CIVIL SUIT

S. C. MacIntyre for the plaintiff.

A. Muthuswamy for the defendant.

Storr, J.: — This case arose over a transaction between the plaintiff and defendant concerning two movable houses, being Nos. 435 and 436, Jalan Mersing, Kluang, Johore, and standing on land held under Temporary Occupation Licence No. 362/48.

The plaintiff's case was that she borrowed two sums of $100 and $150 from the defendant through his mother-in-law and on asking for the second loan of $150 defendant asked her to give him a document about her two houses. She executed two documents by putting her thumb prints on them. The documents were drawn up by one Othman bin Ghani and were Exhibits P1 and P2.

P2 was an assignment of the two houses to the defendant and P1 was an agreement whereby the plaintiff could re-purchase the two houses by instalments. Both documents mentioned the figure of $512 as the amount passing between the parties, but the plaintiff denied that she received more than the $250.

Mr. MacIntyre, Counsel for the plaintiff, submitted that the documents P1 and P2 together amounted to a Bill of Sale and, as they were not in the prescribed form or registered in accordance with sections 3 and 4 of the Bills of Sale Enactment No. 39 (Johore), the transaction was wholly void and the defendant could get no advantage from the documents, and as he had registered the assignment (P2) with the Town Board, Kluang, and assumed ownership of the houses in the face of continued opposition from the plaintiff, the assignment should be declared void and of no effect, or he should be ordered to re-assign the houses.

The defendant's case was that the transaction was not a loan transaction, but was a sale by the plaintiff to him for $512 as stated in the assignment (P2) and that P1 was only drawn at the request of the plaintiff as an after-thought as she had said she was going to Perak, but if she returned she might like to re-purchase the houses at the same figure she sold them for by 10 instalments of $51.20. She did not re-purchase the houses in accordance with P1 and they were therefore his absolutely.

He further stated that the plaintiff paid him rent for the portion of the house she occupied (this was throughout strenuously denied by the plaintiff) and also he had exercised rights of ownership over the

houses and he was entitled to them absolutely and had spent a considerable sum of money on their repairs, etc.

There were allegations on both sides as to receiving rent from tenants.

The defendant submitted that as he had levied Distress against the plaintiff, she was estopped now from claiming the houses. However, it was quite clear from the affidavit filed by the plaintiff in the Distress proceedings (Kluang Magistrate's Court Distress Suit No. 9 of 1951) that she denied that the defendant was her landlord, but that she was the owner of the two houses, which claim the Magistrate apparently ignored and treated the matter as an objection under section 514 of the Civil Procedure Code, which had no application at all to a claim of ownership of houses the non-payment of rent of which was the basis of the Warrant of Distress. All the Magistrate did in that Distress Suit was to hold that the goods seized belonged to the plaintiff and, on the assumption that the defendant had a good title to the houses, were subject to Distress. His decision in no way affected the plaintiff's claim to the houses and, in fact, could not do so in a Distress Suit.

Whatever the allegations made by both parties, the main point for consideration in this case is whether on the evidence before me the documents P1 and P2 together amount to a Bill of Sale and the transaction is void as between the parties, as such Bill of Sale was not in the prescribed form and not registered in accordance with the provisions of sections 3 and 4 of the Enactment.

Mr. Muthuswamy, for the defendant, submitted that the assignment (P2) was an absolute assignment and P1 was an agreement to re-purchase by instalments and the Court could not look behind such documents which speak for themselves.

I do not agree with him in his submission. Lord Esher, M.R., in his judgment in *Madell v. Thomas & Co.*[1] puts the point very clearly as follows :—

"This case seems to me to come exactly within the principle laid down in the case **In re Watson**[2]. In that case we had to consider the true construction of the Bills of Sale Acts, and whether those Acts did not oblige the Court to do, with regard to certain documents, that which but for those Acts they might have no power to do, viz., to go behind the document and ascertain the true nature of the transaction between the parties. The object of the legislature in those Acts has been to protect borrowers against lenders as well as to protect other persons who might be creditors of borrowers. The main object of the Act of 1882 is to protect borrowers as against lenders. When we look at the Act we find that it deals with documents that certainly are not, in the ordinary meaning which they bear, and which but for the Act could not be disputed by the parties, bills of sale; and the necessary implication arises that documents, which are in the ordinary meaning of language on the face of them not bills of sale, shall, nevertheless, be bills of sale within the meaning of the Act, if certain facts exist which do not appear on the face of the document. It follows that the Court must have greater power with regard to the effect to be given to such documents under the Act than they would have apart from the Act. Suppose there was an agreement in writing not under seal by which certain rights were given over personal property, but which on its face would not be a bill of sale within the terms of the Act apart from any question under the Act. Apart from the Act, no evidence could be given of any other intention than that which appeared from the agreement itself. But it is in my opinion obvious that it was intended by the Act, that, though such might be the form of the agreement, the Court should go into the question whether the agreement was not in reality given by way of security for money lent. In my judgment in the case of **In re Watson**[2], the question which we thought to arise and intended to decide was stated to be 'whether it was a true proposition to say that, where the parties have given the transaction, for the purpose of disguising its real nature, a form which is not that of a bill of sale, the Court is precluded from deciding the case according to the real truth and substance of the matter by means of the form so put forward by way of disguise and for the purpose of preventing the Court from getting at the true facts'; and I said that 'the Court ought not to let a sham document, drawn up for the purpose of evading an Act of Parliament, prevent it from getting at the truth of the matter.' I further said, 'I do not deny that people may evade an Act of Parliament if they can: but, if they attempt to do so by putting forward documents which appear to be one thing, when they really mean something different, and which are not true descriptions of what the parties to them are really doing, the Court will go through the documents in order to arrive at the truth.' This language appears to me to be exactly applicable to the present case."

That judgment was followed by Goddard, C.J., in *Polsky v. S. and A. Services*[3] (affirmed by the C.A.).

Having considered the evidence in this case, I have come to the conclusion that the real transaction between the parties was that the plaintiff borrowed $250 and executed an assignment by way of security of her two houses, Nos. 435 and 436, Jalan Mersing, in favour of the defendant, in which a sum of $512 was stated to be the consideration but which, on the evidence before me, I hold did not in fact pass. The only sum that passed between the parties, I hold, was the two amounts $100 and $150 as stated by the plaintiff; I accept her evidence on that point and disbelieve the the defendant. The parties also executed another document (P1) purporting to be a re-purchasing agreement of the houses by the plaintiff from the defendant in 10 monthly instalments of $51.20 per month. The plaintiff's evidence that the transaction was a loan transaction was corroborated by the writer of the two documents P1 and P2, Othman bin Ghani. I accept his evidence and consider that he was a witness to be believed. I also hold that the plaintiff at no time paid any rent to the defendant for any portion of the two houses.

I am confirmed in my opinion that the real transaction was a loan transaction by the wording of P1 and the letter written by the defendant to the plaintiff, being 5 of "X" which reads :—

"Please note that the agreement drawn with me in respect of house No. 436 and 435 at 1½ miles, Jalan Mersing, Kluang, on T.O.L. No. 362/48 on 18th December

1948 on a loan by you from me, has expired and the said loan unpaid. Therefore, in accordance with the terms of the said agreement houses Nos. 435 and 436 automatically belongs to me.

"Please be good enough as to vacate and give up possession of the said houses, otherwise, legal proceedings will be instituted against you, without further notice."

It is therefore quite clear from the subsequent behaviour of the defendant that the transaction is one in which, as Lord Esher, M.R., pointed out in *Madell v. Thomas & Co.*[1], the Bills of Sale Acts are required for the protection of the borrower.

I hold, therefore, that the documents P1 and P2 amount to a Bill of Sale under section 3 of the Enactment and, as they are not in the prescribed form or registered, are void and the whole transaction between the parties is void.

The plaintiff is entitled to the declaration asked for in para 14(a), (b) and (c) of the plaint, i.e.:—

"(a) An order adjudging the aforesaid deed of assignment and agreement of loan as void in law . . . .

(b) An order that the Assistant Registrar do send a copy of the order made herein to the President, Town Board, Kluang, for recording same in the Record Book of rateable holdings and another copy to the Collector of Land Revenue, Kluang.

(c) An injunction against the defendant to restrain him from taking action against the plaintiff for alleged arrears of rent and/or ejectment proceedings in respect of the annexe to house No. 436, Jalan Mersing, Kluang . . ."

With regard to para 14(d) of the plaint, it is admitted that the defendant has done some repairs to the two houses and has paid certain sums for assessment and fees to the Town Board, Kluang, and is therefore entitled to the money expended by him on such items, and I order an enquiry before the Assistant Registrar to ascertain (1) the amount due to the plaintiff from the defendant as compensation for the use and occupation of the houses Nos. 435 and 436, Jalan Mersing, by the defendant, and (2) the amount due from the plaintiff to the defendant for the amount expended by him on repairs and for assessment and fees to the Town Board, Kluang, in respect of the said houses.

With regard to para 14(e) of the plaint, I order that the $686.08 be repaid to the plaintiff or her Solicitor.

I make an order in terms of para 14(f) of the plaint, i.e. for possession of the said houses, and for costs of this suit and I order that the costs of the enquiry before the Assistant Registrar be reserved until his certificate comes before this Court on further consideration.

Judgment for the plaintiff.

CHENG SIAK HOW v. PUBLIC PROSECUTOR

[A. Cr. J. (Hill, J.) July 13, 1953]

[Alor Star — Criminal Appeal No. 58 of 1952]

Excise — Opium and Chandu Proclamation, No. 49 of 1946, s. 7(2) — Evidence — Admissibility of — Similar fact — Conduct.

In this case the appellant was charged with the importation into the Malay Peninsula of 5789⅜ lbs. of opium of a value of not less than $1,000,000. The learned Sessions Judge admitted certain evidence given by accused No. 12 and P.W. 15 who were accomplices.

Held: (1) the evidence given by P.W. 15 that the appellant's name was written on the envelope of the letter could not be admitted as evidence against the appellant; (2) the evidence of accused No. 12 should not have been taken into consideration as it was not part of the case of the prosecution and was against the appellant; (3) the payment of the $400 for the delivering of the letter, the possession of the ½ of a dollar note and the celebration at Penang are all admissible as evidence against the appellant; (4) the opium labels found in the appellant's cabinet are also admissible as evidence; (5) although the learned trial judge has erred in the manner he did there is no substantial miscarriage of justice and that there was sufficient evidence to prove beyond all reasonable doubts that the appellant was concerned in the importation of opium.

Cases referred to:—

(1) *Harris v. Director of Public Prosecutions* (1952) 1 All E.R. 1044.

(2) *Makin v. Attorney-General of New South Wales* (1894) A.C. 57.

(3) *Noor Mohamed v. R.* (1949) A.C. 182.

(4) *R. v. Straffen* (1952) 2 All E.R. 657.

(5) *Thomson v. The King* (1918) A.C. 221;

(5) *R. v. Rodley* (1913) 3 K.B. 468.

CRIMINAL APPEAL.

F. G. Charlesworth, M. N. Cumarasami and *Matthews Killam* for the appellant.

F. G. Cooke (Federal Counsel) for the respondent.

Hill, J.: — In November last the appellant was convicted in the Sessions Court, Alor Star, of the following charge:—

"That you on or about the 8th day of June 1952 were concerned in the importation into the Malay Peninsula of 5789⅜ lbs. of opium of a value of not less than $1,000,000 which were seized on board the Burmese motor vessel 'Shwe Hla Min' at Pulau Paya, in the District of Langkawi, in the State of Kedah on the 8th day of June, 1952, and you thereby committed an offence under section 7(2)(b) of the Opium and Chandu Proclamation 49/46 and punishable under section 7(2) of the said Proclamation."

The appellant was sentenced to one year's rigorous imprisonment and to a fine $2,000,000 or two years rigorous imprisonment and has appealed against the conviction and sentence.

I do not propose to relate the facts at all fully, but will set out facts which appear to be established and undisputed from the evidence.